

COVID-19 and the Corporate Trustee – Can Virtual Noteholder Meetings be Held?

The ability to seek noteholder instructions by holding a noteholder meeting is a fundamental protection for a corporate trustee acting on a note issuance, giving it the ability to seek instructions as a last resort, as well as a key aid to an issuer trying to navigate troubled waters. However, with the continuing COVID-19 pandemic leading to significant restrictions being imposed on people moving and gathering, this article considers how such essential noteholder meetings could still be held – considering both how this may be permitted by the documents and how the standard procedures for running a meeting may need to be varied. This may pave the way for reconsidering how noteholder meetings are held in a post-COVID-19 world.

Noteholder meeting provisions

The standard noteholder meeting provisions scheduled to the back of a typical English law trust deed are often cited as being outdated and anachronistic, although, in their defense, they are tried and tested and well understood by market participants. The provisions are drafted on the basis that real noteholders will turn up to vote at physical meetings, potentially even bringing their bearer note with them. In reality, the beneficial noteholders submit their votes through the clearing systems and the paying agent, or another agent of the issuer, votes on their behalf at the meeting. It is incredibly rare for real noteholders to attend noteholder meetings as the business of the meeting is set out in the notice of meeting and, unlike at a shareholder meeting, the issuer would not impart any further information at the meeting or field questions. Certain of the noteholder meeting provisions which would make sense if real noteholders were attending are already dispensed with – a vote on a show of hands is always followed by a poll vote, which would be decisive.

Location of the meeting

With the above in mind, would it be possible to dispense with the holding of a physical meeting and instead hold a virtual meeting by telephone conference? Standard

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noteholder meeting provisions provide that a meeting shall be held “*on a date, and at a time and place, approved by the Trustee*”. To hold a meeting virtually and not in person would therefore require the approval of the trustee and we would expect a trustee to be nervous agreeing to exercise a discretion to move away from such a well-trodden path of holding a physical meeting.

In considering whether to provide approval for a virtual meeting, we would expect the trustee to consider whether it would be materially prejudicial to the interests of its beneficiaries and/or, depending on the drafting of the trust deed, whether to do so would be in the best interests of its beneficiaries. The test for whether something is materially prejudicial or not is typically held to be a test as to whether there is a negative impact on the economic rights of the holders or the rights ancillary to those (such as a right of control). Given the important decisions that could be made at noteholder meetings, such as dealing with consent solicitations, refinancing transactions or dealing with defaulted transactions, we would argue that being able to hold a meeting virtually where otherwise a meeting could not be held (depriving noteholders of their right to make decisions and control the transaction) would not be materially prejudicial to the noteholders and would be in their best interests, provided that the procedures for holding a meeting can be adequately transposed for a virtual meeting.

Amended procedures

As noted above, noteholder meetings follow a tried and tested formula laid out in the meeting provisions of the Trust Deed and utilise a highly standardised set of meeting documents, such as voting records, block voting instructions and a prescribed agenda. The approach here would need to be tweaked for a meeting held without everyone in the room, and this would again involve decisions being made by the trustee.

Standard noteholder meeting provisions provide that the trustee “*may without the consent of the Issuer or the Noteholders prescribe further regulations regarding the holding of Meetings of Noteholders and the attendance and voting at them as the Trustee in its sole discretion may determine*”. Similar to as described in the section above, we would consider that a trustee would be able to use its discretion to agree varied procedures for meetings to be held virtually if this protected the ability of noteholders to make decisions and exercise control of the transaction, provided the trustee were comfortable with the robustness of those amended procedures.

Some procedures may not need much amendment. As noted above, votes are normally decided on a poll rather than by a show of hands and voting is normally done by way of instructions through the clearing systems to the paying agent, or another issuer agent, to vote by way of a block voting instruction. These procedures could remain.

However, other procedures would require careful thought to work out how to amend for a virtual meeting. For example, although real noteholders rarely attend noteholder meetings, procedures would need to allow them to attend and vote should they wish to do so. In such circumstances, they would normally attend a meeting using a voting certificate or form of proxy and then vote at the meeting using a completed voting card.

With a virtual meeting, it would be necessary to confirm the identity of those noteholders (and other participants) joining the meeting over the telephone and to reconcile the voting certificate, forms of proxy and voting card issued with those being used in the virtual meeting. This could perhaps be achieved with serial numbers being used for the documents issued and/or a live email chain by which the attendees can submit their voting cards or forms of proxy to the meeting to prove their attendance and later to provide their voting cards for their votes to be counted. This would be crucial to ensure the meeting is quorate and whether the appropriate majority for passing a resolution had been achieved.

These are just some examples and suggestions of how the standard procedures for running noteholder meetings may need to be amended. Other changes may be required and a detailed review of the noteholder meeting provisions in the relevant trust deed as well as detailed consideration of the draft noteholder meeting documents (including the agenda used to run the meeting) would be needed.

Conclusion

The ability to continue to hold noteholder meetings is crucial to the functioning of capital markets transactions, particularly in times where issuers are under stress, needing to amend or vary truncations, and where trustees need instructions from their beneficiaries. Where the restrictions on moving and gathering resulting from the COVID-19 pandemic makes the holding of physical noteholder meetings difficult, the trustee could have a central role to play in enabling virtual meetings to be held and to allow its beneficiaries to continue to exercise their rights. If this is done successfully, it could change the way noteholder meetings are held in a post-COVID-19 world.